

Client Security: Can We Do Even More?

By
Martin Cole

Assistant Director, Minnesota Client Security Board
Senior Assistant Director, Office of Lawyers Professional Responsibility

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Several months ago, the *National Law Journal* (NLJ) took aim at the client security funds of the United States (the preferred term these days is actually law client protection funds) in a feature series of articles entitled "An Empty Promise: How client protection funds betray those they were designed to protect." The NLJ chronicled a series of victims of lawyer dishonesty from several states, whose claims to their local client protection funds were met with indifference or payments of only pennies on the dollar.

Although the efforts of a few funds were applauded, the overall tone of the NLJ articles was decidedly negative. The report summed up its findings thusly: "[Client protection funds] are poorly endowed, stingy about payouts and virtually a secret, even to many lawyers whose bar dues help finance them." Two Midwest states were singled out for critical sidebar treatment: Illinois for problems due to inadequate funding, and Nebraska for unnecessary secrecy and what was labeled a "hostile attitude" towards law client protection and the victims of lawyer dishonesty.

Minnesota's Client Security Fund was not mentioned in the articles. How would our fund fare, however, if scrutinized in comparison to other client protection funds or, perhaps even more importantly, on a scale of genuine concern and fairness? We think it holds up pretty well such that Minnesota's lawyers and the public can take pride in the profession's efforts to date in our state. Nevertheless, the Client Security Board continues to seek ways to serve the public even better, and has recently filed a petition in the Supreme Court to increase to \$150,000 the maximum amount that can be paid to a claimant.

HOW DO WE COMPARE?

Statistics tell part of the story of the success of Minnesota's Client Security Fund. The board was created 15 years ago in April 1986, following a petition from the msba. For its first year, the board met to draft rules for operation, which the Court adopted and which took effect in July 1987. Fourteen years later, the board is poised to pass the \$4 million mark in paid claims. This number is both good and bad. While many lawyers take pride in this figure as proof of the substantial level of help lawyers have provided

to victims of lawyer dishonesty in Minnesota, such a figure also causes considerable head-shaking within the bar. It also results in occasional finger-wagging from some members of the public, who see it as indicative of a continuing problem with lawyer dishonesty, since this \$4 million figure does not include any claims against some of this state's most notorious lawyer criminals. No claims were ever paid against either David Moskal or James O'Hagan because all of their victims were repaid through other sources. Such facts do show, however, that lawyer defalcations continue to be a problem. Unfortunately, the need for a healthy client protection fund remains clear.

A more purely positive number to report is that the board recently passed the \$500,000 mark in restitution payments received from or on behalf of the lawyers against whom claims have been paid. The board has received funds from former respondents through the criminal restitution process as part of a convicted lawyer's criminal probation, through civil collection processes, and also through negotiated payments plans. In the past two years, the Attorney General's Office has successfully pursued several third-party claims against various financial institutions on behalf of the board, resulting in some relatively substantial settlements. Attorneys seeking reinstatement following a period of suspension must repay any client security claims paid on their behalf as a condition for reinstatement. This process has also produced some smaller repayments to the fund (attorneys committing the largest thefts rarely seek reinstatement). Overall, the amount of restitution payments received annually has been increasing steadily.

Unlike client protection funds in some states, Minnesota's Client Security Fund has been actively communicated to the public and the bar. In addition to providing articles such as this, the Board issues a press release after every meeting detailing the number of claims paid, the amount of those claims, and against whom they have been paid. Those press releases are then posted on the Client Security Board's Web site (www.courts.state.mn.us/csb/csb.html), along with copies of the rules of the board, an application form, a "frequently asked questions" (FAQ) section, a copy of the most recent annual report of the board, and a complete listing of all lawyers against whom claims have been paid. Also, board members and staff are always willing to speak to groups about the work of the Client Security Board.

CAN WE DO MORE?

Despite these accomplishments, the board is always searching for ways to do even more to assist victims of lawyer dishonesty. The Minnesota Client Security Board rules currently provide for a maximum payment per claim (commonly referred to as a "cap") of \$100,000. Only six states have caps that are more generous than that. Many have limits as low as \$10,000 or less. In several states there also exist maximum payments per respondent attorney ("aggregate caps"), which are especially cited as a cause of claimant dissatisfaction. For example, a state with an aggregate cap of \$200,000 on behalf of one lawyer must wait until all claims are received, or set cut-off dates for filing claims

against a particular lawyer. Then all claims must be resolved in order to determine the total amount of loss, and then a pro rata share is awarded. In addition to substantial delay for claimants, this often results in payments of only pennies on the dollar of a claimant's loss. A stingy aggregate cap was a major factor in the negative publicity Illinois' fund received from the *NLJ*. Minnesota has no aggregate maximum payment amount. As a result, as much as \$419,000 has been paid on behalf of one lawyer in Minnesota, and \$547,000 against two partners jointly.

Despite already ranking high nationally in its ability to pay claims, the board this past year explored whether the means exist to raise the maximum payment per claim in Minnesota. Following close scrutiny of the board's funding and budget needs, and a review of the history of those claims presented to the board to which the cap was applied, it was determined that an increase of the cap to \$150,000 per claim could be absorbed. Moreover, absent the discovery of multiple new major defalcation cases, such an increase will be feasible without any increase in the attorney registration fee. A petition for such an increase in the cap was filed with the Court in April and put out for comment. A copy of the petition and the board's supporting statement are available at the board's Web site. As this article went to press, the msba prepared to review the board's petition at its June meeting. The board welcomes further input from individual members of the bar on their willingness to raise the cap. Oral argument on the request likely will be held this fall.

The board currently receives \$17 per year per licensed Minnesota attorney, collected as part of the annual attorney registration fee. Prior to May 1998, the portion of the registration fee to the board had been \$20 per year, but the board advised the Court that, based upon budgetary projections, a reduction was appropriate. Now, thanks to a year in which payable claims have been down considerably, such that the fund balance has grown to approximately \$2.4 million, the board felt it was more fair to consider providing a boost for the victims. In the eight years since the cap was fixed by rule at \$100,000 per claim, on average there has been one claim per year to which the cap was applied. Thus, the board reasoned, if that historical average continues in future, an increase in payouts of no more than \$50,000 per year will occur, an amount that will have minimal impact on the overall fund balance.

Even though the total number of victims who have not been paid in full is relatively small, what makes an increase in the cap particularly appropriate is that the size of those claims to which the board had to apply the cap continues to increase. This results in a corresponding increase in the uncompensated portion of the claim that is above the cap. Large trusts and estates in particular have been the victims of some unscrupulous attorneys. Such entities are generally treated as one claimant for purposes of client protection reimbursement; each beneficiary may not bring a separate claim. In at least two such claims paid by the board in recent years, the actual loss exceeded \$400,000. While even paying an additional \$50,000 on such losses does not make the victim

whole, enabling the payment of additional amounts without any increase in the registration fee is worthwhile. In other instances, an increased cap will allow full reimbursement, which ought to be the goal of any client protection system.

CONCLUSION

The Client Security Board is one part of the comprehensive system of lawyer regulation and public protection. Lawyer discipline, continuing legal education, and assistance programs for impaired lawyers also play a role in preventing and detecting lawyer theft. The unique role of the Client Security Board is to help the victims overcome their financial losses caused by dishonest lawyers. Minnesota's fund is doing that task well and the board aspires to do it even better.